

STATE OF CALIFORNIA  
DEPARTMENT OF INSURANCE

BULLETIN 80-12

December 24, 1980

TO: ALL TITLE INSURERS, UNDERWRITTEN TITLE COMPANIES,  
CONTROLLED ESCROW COMPANIES AND OTHER INTERESTED PERSONS

SUBJECT: INSURANCE CODE SECTION 12404 – UNLAWFUL REBATES

Since January 9, 1974, the title industry in this state has been operating under the guidance of Department Bulletin 74-2, as amended by Bulletins 74-2A (issued January 31, 1975) and 74-2, (issued January 15, 1979), setting forth this Department's position relating to the propriety of various business practices gauged against the requirements of Section 12404 of the Insurance Code. Section 12404 applies to all persons or entities engaged in the business of title insurance in this state and operates to prohibit the payment, either directly or indirectly, to certain persons, their agents or representatives, having specified interests in real property, of any commission, rebate or other consideration as an inducement for or as compensation on any title insurance business or any escrow or other title business in connection with which a title policy is issued.

It is the purpose of this Bulletin to supersede the 74-2 series Bulletins by means of a consolidated, with amendments of the enumerated prohibited business practices set forth in that series of Bulletins. This consolidation is made following a reappraisal of industry conduct during the past six years and amendments made where deemed appropriate due to changed economic and business conditions. It cannot be emphasized too strongly that this consolidation, in practical effect, constitutes a restatement of the Department's position regarding the propriety of specified business practices and therefore is intended as a guide to appropriate conduct by persons or entities engaged in the business of title insurance. Any violation of the prohibitions set forth herein, brought to the attention of the Department, will result in immediate enforcement action against the person or entity found to have engaged in such activity.

As a preliminary, it is helpful to review and understand the rationale of the anti-rebate provisions of the Insurance Code as applied to the title insurance industry. It is well established that this industry operates in an environment described by economists as reverse competition. We described this phenomenon and the role of the anti-rebate laws in Bulletin 74-2 as follows:

“Purchasers or sellers of residential property who must pay for the almost universally required policy of title insurance seldom make a conscious selection of cost, quality, or service. Rather, the selection is usually made by the agent or representative of the person required to pay for the title policy and, as a consequence, the title industry's competitive effort has been aimed at the agent or representative. While the representative has a fiduciary relationship to the purchaser or seller, cost or service features of the transaction of potential benefit to the purchaser or seller may be subordinated to other considerations found to be personally desirable or beneficial to the representative. As a result the opportunity for enrichment of the representative may be placed in a higher order of priority that the opportunity of securing for the person required to pay for the policy of title insurance the best product in terms of cost or service.

In a free and competitive consumer-oriented market, prices are generally restrained by competition. If the selection of the title service or product is made by a person whose primary interest in the transaction is a collateral benefit flowing to him from the title entity, the motivation for the selection by such person may not be in the best interest of the consumer. However, if consideration of any kind to the party making the selection of the title service or product is eliminated, it is reasonable to assume that the person making such selection will then be motivated by other considerations in channeling or directing title business, where such channeling or directing is unavoidable. It is further assumed that when there is no possibility of a material personal benefit or rebate to the representative of the seller or buyer, said representative would either make no recommendation or would recommend a listing of title companies known to be competitive in terms of price or service in order to protect his own business reputation or his own competitive position.

Recognition of the potential for treating the interests of the consumer as secondary to those of the consumer's agent or representative, created by the fact that the competition that exists is not at the level of the true consumer, goes to the heart of the anti-rebate provisions in the Insurance Code. Those provisions serve as a cornerstone of the effort to maintain a fair and competitive business environment that will serve the needs as well as the best interests of the ultimate purchaser of the title product or service."

While numerous attempts have been made by various title entities to compete directly at the consumer (buyer/seller) level over the past six years, the above observation continue to reflect the marketplace realities confronting the title industry and the role of the regulator within this setting. It is the overriding concern of this department that the consumer of title industry products and services have access to a viable and competitive marketplace that places his or her interests above those of would-be business influencers. The history of the last six years reflects some positive movement toward achievement of this goal; however, much remains to be done. In furtherance of this continuing effort, and for the added purpose of facilitating industry awareness and understanding of this Department's interpretation of Section 12404 and other provisions of the Insurance Code relating to unlawful rebates, the 74-2 series Bulletins of the Department are hereby repealed and superseded by this document. Department Bulletins No. 69-11 and 70-6, pertaining to the subject of subescrows, remain in full force and effect, to the extent they are not in conflict with the ruling of the Attorney General as set forth in Attorney General Opinion No. CV 74/18, May 28, 1975.

As used in the following list of prohibited activities, and for purposes of this Bulletin generally, the term "title entity" refers to a title insurer, underwritten title company, or controlled escrow company. The word "person" and the term "such person," includes any person or business entity defined in subsection (a), (b), or (c) of Section 12404. This term applies equally to individuals as well as to formal or informal groups or associations of such 12404 persons.

The word "benefit" means anything of value. The word encompasses every kind of business or promotional activity conducted by a title entity. The term "special relationship" means any relations wherein a benefit, however small, flows between a title entity and a person, as defined above. The word "rebate" means any benefit flowing between a title entity and a person, as defined above.

The word "affiliate" means any person or business entity who, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, a title entity.

In every instance the enumerated activity is prohibited whether done indirectly or directly, i.e., whether done or caused to be done by the title entity or done or caused to be done by an affiliate of the title entity. In this regard, any effort to conceal forbidden rebate activity through the device of a special bonus or special personal expense account which in turn is spent in a manner that is in violation of the provisions of this Bulletin shall be treated as an indirect violation by the individual making any such expenditure, as well as a direct violation by the title entity providing the bonus, expense account or the equivalent of same. This would apply whether the recipient of the title entity bonus, expense account or the equivalent is denominated an employee, agent, or independent contractor of the title entity.

The Department finds the following alleged or questioned practices and activities to be in violation of the anti-rebate provisions of the Insurance Code.

1) Except as otherwise authorized by Section 12401.8 of the Insurance Code, charging either more or less than the scheduled rate for a specified title or escrow service or for a policy of title insurance, or for the combined rate charged for one or more of the foregoing. The above prohibition includes, but is not limited to, delaying the issuance of a policy in order to qualify a later transaction for a lower rate, charging a discount rate which is not applicable to a particular transaction, or collecting only a portion of an applicable charge for a bonder and waiving the remaining balance if no subsequent transaction occurs. A specified title service is any service defined in the title entity's filed schedule of rates and charges or the schedule in use by the title entity.

2) Waiving, or offering to waive, all or any part of the title entity's established fee or charge for services which are not the subject of rates filed with the Department.

3) Furnishing a title report without charge to any person. Under the provisions of Section 12404.1, a title entity, in its discretion, may furnish, either orally or in writing, the name of the owner of record and the record description of any parcel of real property without charge so long as the company treats equally all persons requesting such information. A title entity may also, in its discretion, furnish without charge photo copies of the deed of record, maps, and plats, provided and to the extent that (a) all persons requesting such information are treated equally; (b) such information is furnished only in single copy; (c) the information so furnished contains no advertising or promotional material for the benefit or use of the person to whom it is furnished, and (d) the information requested does not constitute an appraisal, information kit, work-up, or "farm" for which a charge is otherwise required (Rule 4, below). A title entity may, in its discretion, furnish without charge a property profile on a single piece of property on a form which conforms to the format contained in exhibit A attached to this Bulletin and made a part thereof. Title entities may make a reasonable charge for any and all such information furnished provided the charge is the same to all persons. Where a charge for such information is made, the title entity may nevertheless make an exception for a non-12404 person requesting such information for research, investigation, land survey, or similar reference, whether for individual or corporate use or for the use of an agency of either the local, state, or federal government, provided the requesting party is not acting as, or for the benefit of, a "person" as defined in subsection (a), (b), or (c) of section 12404.

4) Furnishing reports containing publicly recorded information, appraisals, estimates or income production potential, information kits or similar packages containing information about one or more parcels of real property (other than as permitted under Section 3, above) helpful to any such person without making a charge that is commensurate with the actual cost of the work performed and the material furnished.

5) With respect to any such person making or guaranteeing, or offering to make or guarantee, either directly or indirectly: (a) a loan; (b) the proper performance of escrow services; or (c)

the performance of an undertaking (e.g., certifying that any such person, or another on his behalf, has funds on deposit when this fact has not been verified by the title entity).

6) Providing or offering to provide, either directly or indirectly, a “compensating balance” or deposit in a lending institution either for the express or implied purpose of influencing the extension of credit by such lending institution to any such person, or for the express or implied purpose of influencing placement or channeling of title insurance business by such lending institution.

7) With respect to any such person, paying, or offering to pay, either directly or indirectly, for: (a) the services of an outside professional whose services are required by any such person to complete or structure a particular transaction; (b) the salary of an employee of such person; (c) the salary or part of the salary of a relative of any such person employed by a title entity where the payment is in excess of the reasonable value of the work actually performed; (d) a fee for making an inspection or appraisal of property whether or not the fee bears a reasonable relationship to the services performed; (e) for services required to be performed by any such person in his or her professional capacity; (f) except as otherwise provided in Section 12412, any evidence of title or a copy of the contents thereof, which is not produced or issued by the title entity if the evidence of title relates to a current transaction; (g) the rent for all or any part of the space occupied by any such person; (h) money, prizes or other things of value in any kind of a contest or promotional endeavor; (i) any advertising effort made in the name of, for, or on behalf of any such person; (j) any business form, for any such person, other than a form regularly used in the conduct of the title entity’s business which form is furnished solely for the convenience of the title entity and does not constitute a benefit, as defined herein, to any such person; (k) or any salary, commission or any other consideration to any employee who is at the same time actively engaged as a real estate licensee in the real property or mortgage brokerage business.

8) Paying for or offering to pay for, the cancellation fee, the fee for the preliminary title report or other fee on behalf of any such person after inducing such person to cancel an order with another title entity.

9) Paying for, or offering to pay for, entertainment, vacations, gifts, business trips, convention expenses, travel expenses, membership fees, registration fees, lodging, or, except as provided below, food, meals, or beverages on behalf of any such person, directly or indirectly, or providing letters of credit, credit cards, or charge account privileges of any kind or any similar benefit to any such person for any purpose whatsoever.

Moderate expenditures for food, meals, and beverages made for or on behalf of any such person, if correctly claimed and properly substantiated as a legitimate business expense under the provisions of the statutes and regulations of the Internal Revenue Service.

This exception also applies to title entity plant tours and title insurance seminars where the products or services offered by the title entity are discussed or defined. Such tours or seminars may serve as the situs for moderate food, meal, and/or beverage expenditures for or on behalf of such persons provided that the tour, seminar, or gathering is dedicated exclusively to the presentation or discussion of title insurance and escrow products or services. Educational seminars, movies, closed circuit television presentations, and similar programs, dedicated in whole or in part to subjects other than title insurance and escrow products or services, are not a proper subject for expenditures under this exception. To the contrary, such gatherings are an indicia of unlawful inducement, under Insurance Code Section 12404, even without any expenditure for food, meals, or beverages.

With the foregoing exceptions, food, meal, and beverage expenditures for or on behalf of such persons are found to be in violation of the anti-rebate provisions of the Insurance Code whether the title entity, either directly or indirectly, pays for or furnishes the food, meal, or beverage or

contributes money for the purchase of same. Similarly, the prohibition applies whether the expenditure is made by a title entity acting along or by one or more title entities acting through either formal or informal association.

This rule also applies to group activities where such persons comprise 50% or more of those in attendance or those for whom the benefit is intended. Activities such as (but not limited to) meetings, luncheons, dinners, conventions, installation ceremonies, celebrations, outings or related activities of local, regional, or state boards of realty, cocktail parties, hospitality room functions, open house celebrations, dances, fishing trips, motor vehicle rallies, sporting events of all kinds, gambling trips, hunting trips or outings in recreation areas or entertainment areas, and related activities are not the proper situs for food, meal, or beverage expenditures made for or on behalf of such persons.

Further, the furnishing of transportation to or from such activities or areas or payment of the fee, charge or admission to such activities or areas, or the subsidization or reimbursement of the cost to such persons of attending or participating in such activities or visiting such areas, constitutes a violation of the anti-rebate provisions of the Insurance Code. This prohibition applies under every foreseeable circumstance, whether the benefit is offered, paid, or furnished in whole or in part, directly or indirectly, by a title entity acting alone or by one or more title entities acting through either formal or informal association.

10) Paying for, or offering to pay for, any advertising ostensibly for the benefit of the title entity through any advertising medium, the end result of which is the substantial subsidization of a product, service or publication used by, or published or printed by or for the benefit of, any such person or any association or group of such persons. Examples of such advertising are ads placed in subdivision or tract brochures, multiple listing services or books, exchange bulletins, news letters, information sheets, and programs, announcements, periodicals, or any printed matter associated with meetings, seminars, or conventions of such persons as well as registers, directories, or indices of such persons. A presumption of "substantial subsidization" will be made wherever (1) 10% or more of the advertising revenue or printing costs, whichever is less, or any pamphlet, program, announcement, register, directory, index, book, brochure, periodical, newsletter, bulletin, information sheet, or printed matter of any kind intended for local (as opposed to statewide) distribution of circulation is paid for by one title entity; or (2) 50% or more of the advertising revenue or printing costs, whichever is less, of any pamphlet, program announcement, register, directory, index, book, brochure, periodical, newspaper, bulletin, information sheet, or printed matter of any kind intended for local (as opposed to statewide) distribution or circulation is paid, in the aggregate, by one or more title entities.

Business information, whether printed or oral, advertising novelties, and gift items that bear the name of the title entity (but not the name of the recipient) may be given to such persons, provided and to the extent that, (1) the information, gift or novelty item constitutes advertising directed impersonally at the general consumer public, meaning that the information, gift, or novelty item must be given or made available "over the counter", by phone through a generally publicized number, or on some comparable basis to all such persons indiscriminately; (2) the information, gift, or novelty item costs no more than \$3.50 or, if it is a repeat item given or made available on a continuing basis (such as periodic business forecast, a timely recorded message, or a business newsletter), that it cost no more than \$3.50 per recipient or user per year; and (3) distribution of the information, gift, or novelty item, if by mail, is made on a non-selective basis to all persons known or reasonably believed to be members of the business or professional group in the natural geographic area or political subdivision toward which the advertising effort is directed.

11) Furnishing, or offering to furnish, all or any part of the time or productive effort of any employee of the title entity (e.g., office manager, escrow officer, secretary, clerk, messenger, etc.) to any such person.

12) Furnishing or offering to furnish, paying for or offering to pay for, furniture, office supplies, telephones, equipment or automobile to any such person, or paying for, or offering to pay for, any portion of the cost of renting, leasing, operating or maintaining any of the aforementioned items.

13) Providing, or offering to provide, nontitle services (e.g., computerized bookkeeping, forms management, computer programming, or any similar benefit) to any such person.

14) Renting, or offering to rent, space from any such person, regardless of the purpose, at a rent which is excessive when compared with rents for comparable space in the geographic area, or paying, or offering to pay, rent based in whole or in part on the volume of business generated by any such person.

15) Advancing or paying into escrow, or offering to advance or pay into escrow, any of the title entity funds or “closing short,” except as specifically permitted by Section 12404.

16) Buying from or selling to, or exchanging with, or offering to buy from or sell to, or exchange with, any such person, shares of stock in any title entity or any other business concern owned by, or affiliated with, the title entity, regardless of the price or relative value except for purchases or exchanges made through a general public offering. This prohibition also applies to the furnishing, or offer to furnish, legal or other professional services by any title entity to any such person or group of persons to assist such person(s) in the formation of a title entity. The burden will be placed on any existing title entity that invests in a new title entity formed by one or more of such persons to show that such investment does not represent a benefit coming within the prohibition of this Bulletin.

17) Contracting, or offering to contract, with any escrow holder or lending institution to receive, hold, draft, execute, deliver or otherwise handle any documents or funds for, or on behalf of, the escrow holder, with or without charge, where the duty, obligation, or responsibility for receiving, holding, drafting, executing, delivering or otherwise handling the documents or funds is ostensibly that of the escrow holder and where the fee for all, or any part, of such escrow service is billed or collected, in whole or in part, either directly or indirectly, by the escrow holder.

The listing of the foregoing items is not to be construed as definitive and, therefore, it should not be inferred that an omission from the listing constitutes a justification for engaging in a particular rebate practice which has not been specifically proscribed by statute or bulletin. To the contrary, any “special” relationship, as defined in section 12404, coming to the attention of the Commissioner may be investigated with the burden placed on the title entity to show that such “special” relationship is not in violation of Section 12404 as interpreted by this Bulletin.

The presence of a benefit flowing to or from the title entity that would create the presumption of an unlawful rebate includes, but is not limited to, all of the aforementioned business by a person to a title entity. A special relationship might be presumed to exist based on the flow of benefit to the title entity from such person, depending on the facts of each situation. This presumption, if found to exist, will not be rebutted by evidence that a benefit moving to such person is balanced by an equivalent consideration or value of performance moving from such person to the title entity. For example, the presumption would not be overcome by evidence that a title entity’s payment of money or other consideration for any services actually rendered by any such person was merely payment of the fair value of those services, and not an overpayment.

Correspondingly, a special relationship may exist under item (15) where a title entity accepts in escrow an instrument from such person which is not readily negotiable in normal commerce, and notwithstanding such fact, the title entity closing the transaction by advancing its own funds pending collection on the tendered instrument. In such a case, such person may be benefiting by the amount of

interest earned on the committed but uncollected funds from the date of issuance of the instrument until payment is actually made following tender of the instrument. This presumption may be viewed as a direct violation if there is evidence tending to show an intentional delay in tendering the instrument for payment by the title entity, or that the title entity failed to gain assurances that the instrument would be paid in the normal course of commercially acceptable business practices.

All persons subject to Insurance Code Section 12404 are admonished to read this Bulletin, including the listing of prohibited activities, as frequently as necessary to remain fully apprised of its contents. All title entities are instructed to distribute a copy of this Bulletin to every office or branch manager and escrow officer in their employ. Further, all title entities are urged to carefully instruct their employees in the character and scope of prohibited activities defined in this Bulletin. In reviewing questionable activity the Commissioner will look to the spirit as well as the letter of the law. All persons subject to Insurance Code Section 12404 and this Bulletin should be guided accordingly.

In summary, the purpose of this Bulletin is to bring a clarity and understanding to issues arising from the anti-rebate provisions of the Insurance Code and to assist all title entities and the persons with whom they regularly conduct business, in determining how they may meet their respective fiduciary relationships within the limitations prescribed by law, as set forth in the California Insurance Code.

Westly J. Kinder  
Insurance Commissioner

COMMISSION SHOPPING MAY SAVE YOU MONEY

THIS TITLE INFORMATION HAS BEEN FURNISHED WITHOUT CHARGE BY  
TITLE COMPANY IN CONFORMANCE WITH THE RULES  
ESTABLISHED BY THE CALIFORNIA INSURANCE COMMISSIONER, WHO URGES YOU  
TO SHOP FOR THE BEST SERVICE AVAILABLE AND COMPARE CHARGES AND FEES  
FOR TITLE INSURANCE, ESCROW, AND OTHER SERVICES ASSOCIATED WITH THE  
PURCHASE OR SALE OF A HOME.

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PROPERTY PROFILE

ADDRESS: \_\_\_\_\_

RECORD OWNER: \_\_\_\_\_

DEED RECORDING DATE: \_\_\_\_\_

CONCURRENT TRUST DEED, IF ANY \_\_\_\_\_ (See attached)

LEGAL DESCRIPTION: \_\_\_\_\_ (See Attached Deed and Plat)

TAX INFORMATION:

Assessors Parcel No. \_\_\_\_\_

Assessed Value Land \$ \_\_\_\_\_

Assessed Value Improvements \$ \_\_\_\_\_

Exemption \$ \_\_\_\_\_

Net Assessed Value \$ \_\_\_\_\_

Installments \$ \_\_\_\_\_ \$ \_\_\_\_\_

[ ] In lieu of the above, see attached copy of Assessment Roll.

COMPARABLE SALES

	DATE SOLD	ADDRESS	TRANSFER TAX
1			
2			
3			

Instructions: The statement at the top of this form must be in capital letters, not less than 11-point type, and of a contrasting color from the rest of the form.

Exhibit A